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CASE NO. 1:11 CV 2815

**JUDGE DONALD C. NUGENT**

MEMORANDUM OF OPINION  
AND ORDER

**Respondent.**

28 U.S.C. § 2254(a). In addition, petitioner must have exhausted all available state remedies. 28 U.S.C. § 2254(b).

As a threshold matter, petitioner does not set forth any argument which might support the claim that all his convictions are invalid because the Ohio Court of Appeals found one of the aggravated robbery counts was defective. Further, a subsequent mandamus action filed by petitioner made the argument that, under Ohio Revised Code § 2953.13, he was required to be transported to the jail of the county in which he was convicted for a *new trial*. See *Briscoe v. Matia*, 128 Ohio St.3d 365 (2011). That statutory provision was obviously inapplicable, and is not a constitutionally based claim in any event. Finally, as the Ohio Supreme Court noted in his mandamus action, petitioner had an adequate remedy at law in the form of a direct appeal from the resentencing decision, an avenue he has yet to pursue. *Briscoe v. Matia*, 128 Ohio St.3d at 367. As such an appeal is at least theoretically available, see Ohio Appellate Rule 5(a), this court will dismiss this case without prejudice.<sup>2</sup>

Accordingly, the request to proceed *in forma pauperis* is granted, and this action is dismissed without prejudice pursuant to Rule 4 of the Rules Governing Section 2254 Cases. Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis on which to issue a certificate of appealability. Fed.R.App.P. 22(b); 28 U.S.C. § 2253.

IT IS SO ORDERED.

  
DONALD C. NUGENT  
UNITED STATES DISTRICT JUDGE

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<sup>2</sup> The court expresses no view concerning the merits or timeliness of any such appeal.